affirmation

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Largest Award Granted by Board in Race Discrimination Case

by Toni Silberman

Professor Ian A. Hunter, sitting as chairman of a board of inquiry, recently ordered Foster Wheeler Ltd. of St. Catharines to pay Mr. Gladstone Leslie Scott close to $50,000 as compensation, including interest, for racial discrimination.

In the September 1985 issue of *Affirmation,* Christine Silversides wrote a concise summary of the board of inquiry dealing with the complaint of Mr. Scott against Foster Wheeler.

Mr. Scott, a black Canadian citizen trained as a boilermaker-welder, applied and was rejected for a position with Foster Wheeler on a project in Jamaica.

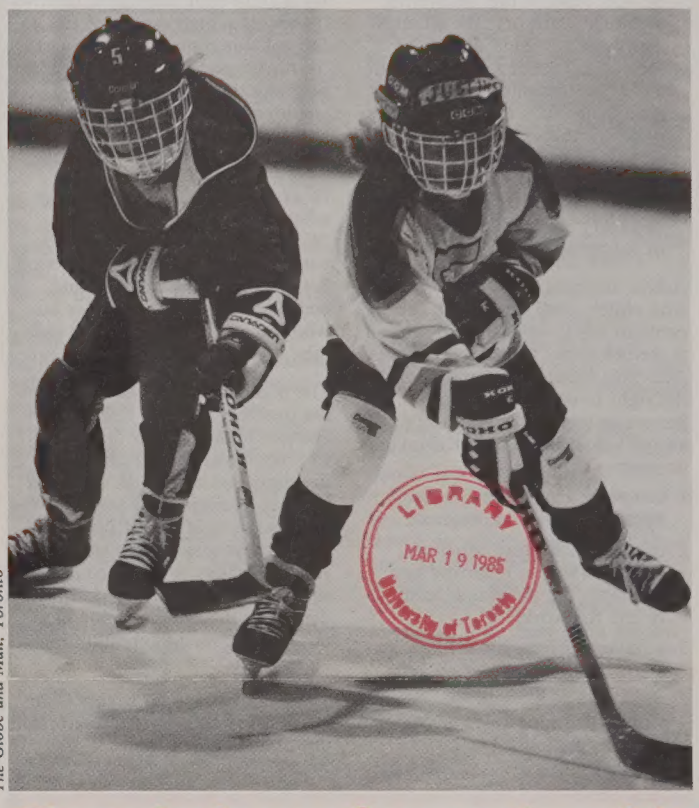
In his decision, Professor Hunter found that, on a balance of probabilities, the decision not to hire Mr. Scott was influenced by race and/or colour and/or place of origin. The respondent is currently appealing this decision in the Supreme Court of Ontario, Divisional Court.

The hearing was also bifurcated at the request of the respondent, and the remedy was determined in November 1985.

Professor Hunter assessed special damages by way of comparison with the work experience of the four successful candidates on the Jamaica project. Assuming that Mr. Scott would have worked for the same 27 weeks' duration had he not been discriminated against, his entitlement to lost wages, less the amount he earned working elsewhere, came to $27,806.48. Lost pension plan contributions and health and welfare benefits amounted to $2,579.85.

Mr. Scott testified that the experience of discrimination was 'one of the most devastating things that ever happened to me in my life.' Recognizing the very serious effect that the discriminatory act had on Mr. Scott, Professor Hunter awarded general damages in the amount of $4,500. Total interest awarded was $15,027.60.

Toni Silberman is Executive Assistant — Public Affairs for the OHRC.



The Globe and Mail, Toronto

Restriction of membership on the basis of sex is reasonable, Court rules

Justine Blainey is a 12-year-old girl who plays hockey—and she plays it very well. In fact, she plays it so well that she was one of 14 players selected out of a total of 64 to play with the 'Olympics'. There is just one problem. The other 13 players are boys, and the 'Olympics' is an 'A-team' in the Metro Toronto League, which is an affiliate of the Ontario Hockey Association (OHA). According to Regulation 250 of the OHA, eligibility for membership is restricted to males. As a result, Justine is prohibited from playing hockey as a member of the 'Olympics' because of her sex.

Section 19(2) of the *Human Rights Code*, moreover, provides that this type of restriction is not an infringement of the general right under the Code to equal treatment with respect to services and facilities. This section would prevent Justine from challenging the OHA regulation under the *Human Rights Code*.

Justine has therefore challenged the validity of section 19(2) itself under the Canadian Charter of Rights and Freedoms. The commission was a party to this action and supported Justine's view that section 19(2) should be struck from the Code. The commission has, in the past, recommended that section 19(2) should be deleted from the Code.

The case was heard in the Supreme Court of Ontario in early September, and the decision was released on September 25th. In its decision the Court upheld the validity of section 19(2). In doing so, the Court found that although both the purpose and the effect of section 19(2) are in violation of section 15(1) of the Charter, this is a reasonable limit on the equality rights set out in section 15(1) of the Charter and is demonstrably justifiable in a free and democratic society. Justine Blainey is appealing this decision. The government of Ontario is also considering the repeal of section 19(2) of the Code.

Alcoholism is a 'physical disability' in P.E.I.

Some time ago the P.E.I. Human Rights Commission defined alcoholism as a form of disability suffered as the result of an illness and placed it into the same category as such chronic diseases as asthma, diabetes and high blood pressure. Would a similar definition be accepted in Ontario?

In confronting the problem of alcoholism, the P.E.I. Human Rights Commission found it necessary to make two distinctions:

First, it distinguished between the condition of alcoholism and the act of drinking.

Second, for its purposes in administering the *Human Rights Act*, the commission distinguished three types of alcoholism:

a. that of the *active alcoholic,* the individual who is addicted to alcohol and whose compulsive and repetitive use of alcohol interferes in any major area of his or her life, including that of work;

b. that of the *inactive alcoholic,* the individual who is remaining free of alcohol dependence (the commission considers an individual to be an inactive alcoholic when the drinking habit has been completely

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broken, permitting the individual's physical and mental health, skills and job performance to return to an acceptable level);

c. that of the *recovering alcoholic*, the individual who is taking or who has taken treatment, is following a prescribed rehabilitation course and is continuing to have his or her recovery monitored by a treatment centre or AA. Also in the 'recovering alcoholic' category, the commission would include the person seeking authorized absence from work for recognized medical treatment. Such a person is entitled to receive benefits and considerations similar to those granted for other illnesses in which absence from work is necessary for medical treatment or hospitalization.

Active alcoholics and individuals who either drink on the job or come to work incapacitated are *not* protected under the *Human Rights Act*. This means an employer has the right to either refuse to hire a person or terminate the position of an individual if his or her drinking problem:

1. adversely affects job performance and productivity;
2. causes unscheduled absences from work on a recurring basis or makes the individual habitually late for work;
3. adversely affects his or her own safety or the safety of co-workers and the public;
4. violates working rules or company regulations.

By placing the condition of alcoholism in the category of a disabling illness, the commission has offered the protection of the *Human Rights Act* to both inactive and recovering alcoholics. If an inactive alcoholic is denied a job based on his past alcohol record rather than on his job skills, training, aptitudes and experience, the commission would accept a complaint from the individual under 'physical disability'.

As with other physical disabilities, the employer must attempt to make 'reasonable accommodations' for a recovering alcoholic; that is, if there is a high degree of risk to the individual or others during the 'recovery' period, an attempt must be make to find alternative employment until the employee clearly demonstrates that he or she has become an inactive alcoholic.

In addition, the commission has offered the protection of the *Human Rights Act* to those who wish to enter the P.E.I. Addiction Services Treatment Centre and become recovering alcoholics but who are afraid they will lose their jobs if they do so.

The commission has also extended the protection of the P.E.I. *Human Rights Act* to those inactive alcoholics who are being discriminated against in access to services, facilities and accommodations because of a past history of active alcoholism. Included in access to services is access to insurance, a service that is frequently denied an inactive alcoholic based not on his present condition but rather on a past condition.

The Ontario Human Rights Commission has consistently interpreted the Code in this manner.

Economic benefits of employment equity outweigh costs

by Christine Silversides

Many employers are reluctant to embrace the concept of employment equity, assuming that the program implementation costs will be greater than the benefits and that employment equity would therefore cut into economic profits. The misconception of employment equity as an economically inefficient program increases in periods of high unemployment, rapid technological change and structural problems in the labour market.

It cannot be denied that there are real costs associated with the development and implementation of employment equity programs. The real issue, however, is whether the costs of employment equity outweigh its benefits, both for individual employers and for the nation.

In 'The Socio-Economic Costs and Benefits of Affirmative Action for Canada', a recently published study commissioned by Judge Rosalie Abella, Monica Townson addresses this question. The study examines the costs and benefits, in human and economic terms, of failure to make use of all of Canada's human resources. It then moves on to weigh the costs and benefits to discover that an overall economic benefit results from implementation of an employment equity program.

Townson looks at evidence that Canada is not making full use of all of its human resource potential, citing higher unemployment rates, lower occupational status and lower income levels of particular groups—these are indicators that have usually been held to be *prima facie* evidence of unequal employment opportunities. She points out that social and economic costs result from the underutilization of human resources. That is, when certain groups suffer inequities in

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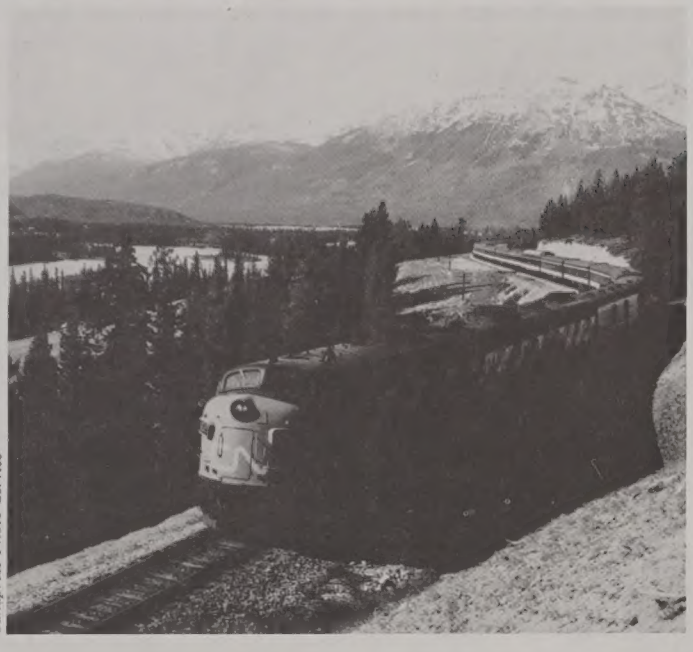
Court of Appeal rules on affirmative action

by Brian Dominique



Canapress Photo Service

In an appeal brought by the Canadian National Railway Co. against the Canadian Human Rights Commission and Action Travail des Femmes, the Federal Court of Appeal struck down the quota portion of an ordered affirmative action program. This was the first such quota program ever ordered in Canada.

The quota order had been made by a federal tribunal of inquiry on the basis that CN had intentionally discriminated against women in its hiring for blue collar positions.

The complaint was first brought by the advocacy group, Action Travail des Femmes, and focused on the hiring practices of CN in the St. Lawrence (Quebec) region. In this region women made up less than one per cent of CN's blue collar work force compared with a 13 per cent national average. The tribunal found that although CN was aware of the problem, women continued to be subjected to non-related strength and mechanical aptitude tests for low or unskilled positions. Men were not subjected to these same tests, and the tribunal found that CN's policy seemed to be to give women access to jobs 'only when they had the same or better qualifications than men, even if these qualifications were not essential for performing the job in question.' Based on these findings and other statistical evidence, the tribunal found CN guilty of discrimination against women in employment pursuant to s.10 of the *Canadian Human Rights Act*.

The tribunal made what can be described as a three-part order. Firstly, CN was ordered to eliminate or alter those hiring practices that had been found to be discriminatory. Secondly, CN was ordered to hire at least one woman for every three men hired until such time as 13 per cent of the CN blue collar work force were women. CN was further ordered to undertake a publicity campaign with a view to encouraging women to apply for blue collar jobs. Thirdly, CN was ordered to supply statistics to the Canadian Human Rights Commission at the end of every business quarter, as a means of proving compliance with the affirmative action order.

CN appealed these orders to the Federal Court of Appeal. The majority of the Court held that while a tribunal may order a special program (including quotas), such an order must be directed to the prevention of discriminatory practices in the future, rather than to the correction of past wrongs. This holding was the result of a very strict reading of s.41(2) of the *Canadian Human Rights Act*.

The Court then concluded, relying on the tribunal's reasons for the order, that the quota program was remedial rather than preventive.

Thus, while the Court indicated that it was sympathetic to the order, it struck down the quota portion of the order as being beyond the statutory jurisdiction of the tribunal. The decision is under appeal to the Supreme Court of Canada.

It should be noted, however, that this decision may be of limited application to complaints brought under the Ontario *Human Rights Code*. The wording of the Ontario Code is much broader with respect to the type of remedies that can be ordered by a tribunal, and appears to allow for both remedial and preventive orders.

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Editorial

A public opinion survey recently showed that more than half the Canadian people had never heard of the racial problems in South Africa and did not know what apartheid means. Fifty-two per cent were unaware of one of the most pressing problems in human society today.

The sad fact is that a large segment of our population (and not ours alone) has but a very small interest in public affairs. Its members are taken up with everyday questions of making a living, family problems or some particular sphere of personal interest. The issues of the world are left to others—which explains why but a portion of our citizens bother to exercise their franchise at election time. Only a minority involve themselves in the community and even fewer in the fate, fortunes and misfortunes of other people.

In consequence, the responsibility of those who do care is very great indeed. Hopefully, there are enough amongst us who care about human rights here and abroad to see that these rights are safeguarded in every way. Are you one of our number? Write your representative, join a community group—do any of a hundred things—but do something!

Canapress Photo Service

Four coffins containing the remains of victims of racial violence are displayed at a public ceremony in the Kwathema Stadium in Johannesburg, South Africa.

Chairman's corner

Jim Merrithew

As I enter my fifth year as chairman of the Ontario Human Rights Commission and as human rights assumes a prime position on the provincial agenda, I am exhilarated by the promise of a new era of cooperation and mutual support.

As an important expression of its active support and interest and of its recognition of the onerous burden placed upon us, the government has granted us the single largest increase of human resources in our 23-year history. These 41 additional officers, deployed in both compliance and race relations, will go a long way towards ensuring maximum efficiency and strengthening the protection and enhancement of human rights in Ontario.

In his statement in the legislative assembly some months ago, the Honourable William Wrye, Minister of Labour, expressed the government's commitment to appointing outstanding individuals to the Ontario Human Rights Commission. This has been confirmed by the appointment of Mr. Dan McIntyre as a member of the commission and as commissioner for race relations, effective January 15, 1986.

As you will recognize from his profile, which will be appearing in the next issue of *Affirmation,* Dan's academic and professional credentials render him most worthy and experienced to assume guidance of our Race Relations Division programs.

As I have stressed continually throughout my term as chairman, racism is an evil that can destroy the fabric of society. Racial harmony in this province is, and must be, of paramount importance to our government and to every person in Ontario. Alongside the current and future diligent efforts made by both the commission and the division to combat racial discrimination and ensure that every person has, in theory and in fact, the right to equal treatment without discrimination, the commission will be actively involved in the United Nations' Second Decade to Combat Racism and Racial Discrimination.

I look forward with great enthusiasm to working with Dan towards the realization of our common goal.

I would also like to take this opportunity to express our heartfelt thanks and appreciation to commissioners Mary Lou Dingle and Dr. Bhausaheb Ubale, who have served us with distinction for three and, approximately, eight years respectively, and whose terms of office expired on November 30, 1985. We wish them good fortune in their future endeavours.

Systemic discrimination

Second of three parts
by Michael Betcherman

In Ontario, the human rights legislation is specifically worded to make unintentional [constructive] discrimination illegal. In other jurisdictions, the final answer to whether unintentional discrimination is illegal awaits the decision in a case recently heard by the Supreme Court of Canada.

The Supreme Court will decide whether a railroad company was guilty of discrimination by dismissing an employee for not wearing a hard hat because of his religious beliefs.

Until now there have been very few Canadian cases involving systemic discrimination on racial grounds. One example is the case of a man of Pakistani origin who unsuccessfully applied for the position of a full-time supply clerk with the Ontario Government.

This man had been working for the Ontario Government as a supply clerk on a contract basis. He was one of 12 candidates who applied for nine available permanent supply clerk positions. All 12 of the candidates were working as supply clerks on a contract basis.

The Pakistani expected to obtain one of the permanent positions. He had more on-the-job experience than any of the other candidates and had never received any complaints about his work. Moreover, he had 'introduced most of the others to the requirements of the job when they began work.' When he did not get one of the positions, the Pakistani filed a complaint with the Ontario Human Rights Commission.

The Pakistani did not get a position because he had not done well at his interview. At the interview each candidate was asked a number of questions by three interviewers. 'Roughly the same questions' were directed at each. At the end of the interview, the three interviewers 'reached a concensus about what rating each candidate should receive' based on their answers to the questions and the standards set by a rating manual.

The Pakistani had received the second lowest rating having scored poorly in the area of expression, initiative, reliability and personal characteristics.

At the hearing before the Board of Inquiry, the Pakistani contended that the interview procedure discriminated against him. He did not 'say that there was a conscious intent to discriminate' but argued that 'reliance on an interview as the sole method of allocating the permanent jobs constituted indirect discrimination against him.' He claimed that because of his ethnic background he performed badly at the interview and 'didn't get a chance to have his real capacity for the job evaluated.' As a result, he claimed he was wrongfully refused a permanent position.

At the hearing, the rejected candidate relied on the testimony of a professor of anthropology. The professor testified that when being interviewed by someone of authority, someone with the candidate's background would likely assume a deferential, low-key, non-assertive manner and as a result would score poorly in the areas of assertiveness, initiative and expression.

The rejected candidate also relied on the testimony of a professor of industrial psychology who testified that 'the interview was an inappropriate method of selection for the supply clerk jobs.' The professor claimed that 'more weight should be given to on-the-job assessments of candidates.'

The employer pointed out that two of the successful candidates were also of South Asian origin. One was a Hindu, born and raised in Kenya, and the other a Christian who had been born and raised in Guyana. The employer's cross-examination of the anthropology professor disclosed that she was unaware of any statistical evidence which showed that in Canada, Pakistanis 'who participate in interviews of this kind...do proportionately worse than other groups.' The professor also stated that there is no statistical evidence 'to demonstrate any distinctions in interview performance between different groups of South Asians.'

The Board of Inquiry dismissed the Pakistani's complaint. The Board said that the Pakistani had failed to present statistical evidence to support his argument and that as a

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The numbers game

by W. Gunther Plaut

Increasingly, the Canadian courts are examining the rights of our people in the light of constitutional guarantees. The Supreme Court of Canada has already dealt with certain aspects of religious equality, and now the Supreme Court of the United States will decide a case that may well set a precedent for Canada as well. It involves a member of the native population in the United States who resisted having his young daughter entered in the rolls of the social security program because, he averred, his religion forbade him to assign her the required number.

There are many who wonder why anyone should be bothered by such a seemingly harmless practice as getting a social insurance, credit card or bank, number. The fact is that while social insurance and its arithmetic fall-out are very recent, human aversion to being numbered is very old indeed.

Most historians assert that Otto von Bismarck, founding chancellor of Germany's Second Reich, instituted the first state-run social insurance program. In 1883 the German parliament enacted a system of public health insurance; a year later workers' compensation was introduced; and five years thereafter old age and incapacity were added to the insurable causes. (Incidentally, that law of 1889 also introduced the age of 65 as the time for retirement, which, critics claimed, was a sop for the opposition Social Democrats, but did not do much for the workers because all too few lived long enough to claim their retirement benefits.)

But while such programs are just a century old, religious resistance to all forms of counting humans has a long history. The Bible furnishes an excellent example. Numbering was a privilege reserved for God because it was believed that the mystery of human individuality was tainted when it was submerged in figures and calculations. Numbers could not be substituted for people, only the Almighty 'had our number.'

Hence a census was not taken except at divine behest, and when King David engaged in conducting his own unauthorized survey the results were disastrous. To this day there are pious old-timers in the Jewish community who follow the practice of counting people in a very special way. Since they would not presume on divine privilege

and count '1, 2, 3...' they count instead *'not 1, not 2, not 3...'* This may seem to some an amusing circumvention; it nonetheless has symbolic value, for it reminds us of the need to separate ourselves from the ever greater encroachment of numbers.

I, for one, hold out for some way of preserving my own name. Aside from all else, I am a child of the generation that remembers those who were numbered by the Nazis in the concentration camps. The slave masters knew well what it meant to deprive their prisoners of their self-hood. Numbering them on their arms (even if it was for temporary survival) served this goal all too effectively.

I fear the quantification of life. I have more trust in 'John Smith' being protected in his human rights, than 'Number 756233'. I hope that when Canadian courts are faced with this kind of case they will address themselves not only to constitutional law but to the deeper questions as well.

Dr. Plaut is Editor of Affirmation.

Systemic discrimination
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result he failed to prove that the employer's assessment procedure had a 'disproportionate impact' on members of his group. In coming to this decision, the Board pointed out that the fact that two other South Asians had scored highly was 'not necessarily consistent' with the anthropologist's testimony.

The Board of Inquiry went on to say that if the applicant had proven that the employer's assessment procedure had a disproportionate impact on members of his group, the employer would then have to prove that the use of the assessment procedure was a business necessity. In other words, if the assessment procedure is intended to select employees with particular characteristics, the employer must prove that these characteristics are necessary for the proper performance of the job in question.

The Board of Inquiry added that even if the employer is able to satisfy the necessary business requirement, the employee will win the case if he can demonstrate that there is another non-discriminatory assessment procedure which will serve the employer's legitimate business interests.

Michael Betcherman is a member of the Bar of Ontario.

This article is reprinted from the *Employment Law Report*, June 1985 with permission of the publisher. Part 3 will appear in the next issue of *Affirmation*.

Economic benefits
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employment there is a cost to society in terms of wasted potential: poor employee morale leads to high turnover or absenteeism; higher unemployment results in higher cost for social support programs; and general social unrest may even result from a lack of opportunities for particular groups.

Not only are the talents of certain groups underutilized by employers, but data indicate that Canada has made very little progress in improving the employment situation of any of the four target groups examined by the Royal Commission on Equality in Employment. Townson concludes that there is a need for measures to improve employment opportunities for women, disabled persons, native people and visible minority groups. Failure to act may result 'not only in a continuing and disproportionate burden on social support programs, which will have to be directed to members of these disadvantaged groups, but in other social costs. These include, for example, the increased difficulty for women of breaking into non-traditional job areas because of high technology. So we must make sure, Townson cautions, that 'productivity gains made possible by the application of new technology are shared by all groups in society.'

She points out that the costs on a national scale include differential benefits and costs accruing to labour, the change in taxation revenues to Canadian governments, the change in foreign exchange earnings and differences in returns to capital of, for example, native people's unemployment. It is clear the elimination of these costs will offset the cost of implementing employment equity on a national scale, Townson says. But the real question is whether there will be a net benefit to the nation.

Looking to the United States experience, Townson notes that although many studies do not make an attempt to assess the benefits of an employment equity program, Nestor Cruz of the Equal Opportunity Commission estimates that while equal employment opportunity in the United States may cost that country close to $10 billion a year, the benefits are worth $15 billion, representing a 50 per cent return on the investment in employment equity. Using the same methodology, Townson calculates that the benefits of employment equity for Canada would be two per cent of $69.6 billion, or $1.39 billion, a year.

Regardless of the method employed to calculate cost on a national scale, the most important conclusion that emerges from the U.S. literature, Townson says, is that employment equity programs generate substantial benefits to individual employers. Major employers such as Levi Strauss, United Technologies and Dow Chemical, have expressed favourable reactions to employment equity programs. For the first time, personnel departments have the resources with which to do human resource management analysis. Companies are discovering that their job standards are often substantially inflated. Employee morale, absenteeism and turnover have all been positively affected. International Telephone and Telegraph has found that both quality and productivity rose with implementation of employment equity. Overall, Townson concludes, the experience of examining traditional personnel policies and practices has been invaluable in teaching business how to manage human resources more efficiently.

In the recent recession, high unemployment rates forced a restructuring of work and retrenchment programs, drastically affecting human resources. As the country presently enters a period of slow economic recovery, human resources have become a central issue. Many companies have already recognized the importance of integrating human resource management concerns into organizational purpose and strategy. Townson points out that human resource management includes making full use of the 'human resource potential of women and minority group members' and employment equity is the vehicle by which to do so.

In the long run there is a cost reduction associated with the development and implementation of employment equity as a part of efficient business operation. Well-informed employers will now understand that employment equity programs bring economic benefits both to their businesses and to the nation as a whole.

Christine Silversides is a second year student at Osgoode Hall Law School, York University, who worked with the commission during the summer, 1985.

As we go to press, the Supreme Court of Canada has handed down a decision in the case of Theresa O'Malley (Vincent) versus Simpsons-Sears Limited declaring that proof of intent to discriminate is not necessary to obtain relief under human rights legislation. The decision will be featured in the next issue of *Affirmation*.